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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO CEASAR LOPEZ,

Defendant and Appellant.

E070621

(Super.Ct.No. SWF1600815)

OPINION

APPEAL from the Superior Court of Riverside County. John M. Davis, Judge.

Affirmed with directions.

Lillian Hamrick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Daniel J. Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Antonio Ceasar Lopez guilty of assault with a semiautomatic firearm (Pen. Code¹, § 245, subd. (b), count 1), and found that he personally used a firearm during the commission of the offense (Pen. Code, § 12022.5, subd. (a)). Prior to trial, defendant pled guilty to possession of a firearm by a narcotics addict (Pen. Code, § 29800, subd. (a), count 2) and being under the influence of a controlled substance (Health & Saf. Code, § 11550, count 3). He later admitted he had served two prior prison terms (Pen. Code, § 667.5, subd. (b)), had one prior strike conviction (Pen. Code, §§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)), and had one serious prior felony conviction (Pen. Code, § 667, subd. (a)). At sentencing, a trial court denied defendant's *Romero*² motion to dismiss his prior strike conviction. It then sentenced him to the midterm of six years on count 1, doubled pursuant to the prior strike, plus five years on the prior serious felony conviction enhancement, for a total of 17 years in state prison. The court stayed the sentence on count 2 under section 654 and struck the punishment on the remaining count and allegations.

On appeal, defendant contends that: (1) there was insufficient evidence to support his conviction on count 1; and (2) the matter should be remanded for resentencing pursuant to Senate Bill No. 1393 (2017–2018 Reg. Sess.) (SB 1393). We agree the matter should be remanded for resentencing. In all other respects, we affirm.

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

FACTUAL BACKGROUND

A passing motorist observed defendant lying on the center divider of the freeway with an “unknown object” in his hands. The motorist exited the freeway to call 911 because he was concerned. As he was talking to the dispatcher, he observed defendant running on the freeway and noted that he was holding the object like a rifle. He noticed defendant pointing it out toward the traffic about three or four times. The motorist then recorded defendant on a camcorder and tried to zoom in to see what defendant had, so he could relay the information to the dispatcher. (The video was played for the jury at trial.) The object was later determined to be a semiautomatic .22-caliber rifle.

A police officer responded to the call. The officer approached defendant and ordered him to raise his arms up, so he could see his hands. The officer had to tell him several times before he complied. The officer then ordered him to come over the center divider wall, and defendant complied and walked toward him. The officer initially observed that defendant smelled like sulfur, or gun powder. He also noticed that defendant exhibited signs of drug use. The officer put him in handcuffs, and another officer went over to the center divider and found defendant’s rifle on the ground.

At trial, the first officer testified that gunpowder residue or smoke can get on a person’s skin and clothes, if he has fired a firearm; thus, it was significant that defendant smelled like sulfur. He also testified that he had a chance to inspect defendant’s rifle and noted that it “smelled like it had been very recently fired.” The officer thought that fact was significant because it meant that defendant had probably fired the rifle shortly before he contacted him. He testified that a high level of the sulfur smell dissipates from a gun

within 30 minutes to two hours after being fired, and the condition of defendant's rifle indicated it had been fired "well within the two hours."

The officer was handed a semiautomatic .22-caliber rifle in court in order to demonstrate some things to the jury. He testified that the rifle was magazine fed, and that the magazine held the bullets. He explained that the breech³ of the gun was the part where the spent bullet casings ejected. He further explained that a spent casing meant a bullet had been fired. The officer then testified that when he was given defendant's gun to inspect, the magazine was inserted, and there was one live round of ammunition that had not been fired, which was sticking out of the breech. He removed the magazine, looked inside the breech, and noted two unspent bullets in the barrel. There was also a spent casing stuck inside the barrel, which is why the other bullets could not feed into the barrel. The officer used some type of tool to pry the casing that was stuck out of the barrel. Once the casing was removed, the gun was tested by a criminalist, and it functioned properly.

ANALYSIS

I. The Evidence Was Sufficient to Support Defendant's Conviction

Defendant argues that the evidence did not support his conviction of assault with a semiautomatic firearm because he did not have the present ability to commit a violent injury, since his rifle was jammed. We conclude the evidence was sufficient.

³ We note that the reporter's transcript incorrectly spells the word "breech" as "breach."

A. *Standard of Review*

In reviewing a challenge to the sufficiency of the evidence, we “must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053 (*Kraft*).) “The same standard applies when the conviction rests primarily on circumstantial evidence.” (*Ibid.*) “ ‘Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.’ ” (*People v. Bean* (1988) 46 Cal.3d 919, 933.) “Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

B. *The Evidence Was Sufficient*

Defendant specifically contends that, in order to convict him, the People were required to show that he would have been able to clear the jam in his rifle immediately or “near immediately.” He claims there was no evidence he could clear the jam. However, the jury was instructed that to find defendant guilty of count 1, it had to find that: (1) he did an act with a semiautomatic firearm that, by its nature, would directly and probably result in the application of force to a person; (2) he did that act willfully; (3) when he acted, he was aware of facts that would lead a reasonable person to realize that his act, by its nature, would directly and probably result in the application of force to someone; and (4) when he acted, he had the present ability to apply force to a person with a

semiautomatic firearm. There was sufficient evidence to support the jury's finding that defendant had the present ability to commit assault with a semiautomatic firearm. (§ 245, subd. (b).)

In *People v. Ranson* (1974) 40 Cal.App.3d 317 (*Ranson*), the defendant was convicted of assault with a deadly weapon on a police officer engaged in the performance of his duties (§ 245, subd. (b)), and the court found that he used a .22-caliber rifle (§ 12022.5). (*Id.* at pp. 318-319.) The rifle held by the defendant was loaded and operable. However, since the top cartridge that was to be fired was at an angle, the gun was jammed. (*Id.* at p. 321.) On appeal, the defendant argued there was insufficient evidence he had the present ability to commit a violent injury on the peace officer. (*Id.* at p. 320.) The court stated that section 240 provides: "An assault is an unlawful attempt, *coupled with a present ability*, to commit a violent injury on the person of another." (*Id.* at p. 321.) It then explained that in California, it was settled that "pointing an unloaded shotgun does not constitute 'present ability.'" (*Ibid.*) However, "an automatic rifle does present such 'present ability' when there are loaded cartridges in the magazine of the rifle even though the firing chamber is empty" and "only an 'instantaneous transfer' is necessary." (*Ibid.*)

In that case, the rifle held by the defendant was loaded and operable, although it was jammed. (*Ranson, supra*, 40 Cal.App.3d at p. 321.) The court noted there was evidence from which the trial court could infer that the defendant knew how to take off and rapidly insert the clip. (*Ibid.*) The court further noted that the term "present" can denote "immediate" or "a point near 'immediate.'" (*Ibid.*) The court found that the

defendant had the present ability to commit a violent injury, since he could have adjusted the misplaced cartridge and fired quickly. (*Ibid.*)

In 2008, the Supreme Court affirmed that *Ranson* was still good law. In *People v. Chance* (2008) 44 Cal.4th 1164 (*Chance*), the court explained that in *Ranson*, the defendant “had to remove the clip, dislodge a jammed cartridge, reinsert the clip, chamber a round, point the weapon, and pull the trigger. (*Id.* at p. 1173.) The court found that *Ranson*’s analysis was consistent with the language of section 240. (*Chance*, at p. 1173.) It held that a defendant “has the ‘present ability’ required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, . . .” (*Id.* at p. 1172.)

Here, the evidence showed that defendant pointed a loaded .22-caliber semiautomatic rifle toward the traffic on a freeway several times. Other than being jammed, the rifle functioned properly. An expert testified at trial that when a gun jams, it is usually a temporary issue that can easily be fixed. The officer who inspected defendant’s rifle at the scene testified that he pulled back the breech on the gun and the casing that was jammed was in plain view. The other spent casings fell out, and he put his fingernail in to try and pull the casing out, and then used some type of tool to get it out. Thus, the jury could have reasonably found that the casing was a temporary jam that could be readily removed. Defendant just had to clear the casing, and he would have been able to fire the rifle. Accordingly, he had the present ability to commit assault with the firearm. (See *Chance, supra*, 44 Cal.4th at p. 1172 [a defendant has the present ability “even if some steps remain to be taken”].)

Defendant argues that the jam could not be cleared quickly. However, it appears that the officer removed the spent casing rather promptly. Defendant next contends there was no evidence he would have known how to clear the jam. However, the jurors heard the officer's description of the jam and how he removed the casing, and they apparently believed defendant could have readily cleared the jam.

In any event, the evidence supported a finding that defendant had the present ability to commit assault with a semiautomatic firearm, since there was strong circumstantial evidence he discharged the rifle *prior* to it being jammed. The evidence showed there was a spent casing stuck inside the barrel, which is why the next bullet could not feed into the barrel. The spent casing indicated the rifle had been fired before it jammed. Furthermore, the officer testified that the rifle smelled like it "had been very recently fired," which meant that defendant had probably fired it shortly before he came in contact with him. The officer added that the specific odor of a gun, after it has been fired, dissipates within 30 minutes to two hours, and the smell of defendant's rifle indicated it had been fired well within the two hours. The officer also testified that, when he handcuffed defendant, defendant smelled like sulfur, or gunpowder. He added that gunpowder residue or smoke can get on a person's skin and clothes when he has fired a firearm; thus, it was significant that defendant smelled like sulfur. Moreover, the reporting witness observed defendant lying on the freeway, pointing the rifle toward the traffic several times. In sum, the circumstantial evidence supported a finding that defendant had fired the rifle at motorists on the freeway.

Defendant points out that no witness saw him fire the gun or heard the sound of gunfire. However, the evidence showed that defendant was pointing his rifle at the cars *passing by* on the freeway. If the motorists were driving by rapidly, they may not have seen defendant or heard gunshots. He further asserts that there were no spent casings found near him, on the ground. However, the evidence showed that there was a spent casing stuck inside the barrel, which had not been extracted from the rifle.

Therefore, viewing the evidence in the light most favorable to the judgment, as we must, we conclude the evidence was sufficient to support defendant's conviction of assault with a semiautomatic firearm. (*Kraft, supra*, 23 Cal.4th at p. 1053.)

II. The Matter Should Be Remanded for Resentencing

On September 30, 2018, the Governor signed SB 1393 which, effective January 1, 2019, amends sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) Defendant contends SB 1393 applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction was not final when SB 1393 became effective on January 1, 2019. Thus, the matter should be remanded to the trial court to allow it to exercise its discretion to dismiss his prior serious felony enhancement (hereinafter, the nickel prior), pursuant to SB 1393. The People concede

that SB 1393 applies here,⁴ but argue that remand is unnecessary. We agree with defendant.

We initially note the general standard for assessing when remand is required for a trial court to exercise sentencing discretion. “ ‘[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.]’ ” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*).) In other words, “a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement.” (*Ibid.*) Courts have applied this standard in the context of Senate Bill No. 620 (SB 620), which gave trial courts discretion to strike allegations subjecting a defendant to sentence enhancements under section 12022.53, where such discretion had previously been prohibited (former § 12022.53, subd. (h)). (*McDaniels*, at pp. 424-425; *People v. Chavez* (2018) 22 Cal.App.5th 663, 712-713 (*Chavez*).) We see no reason why this same standard would not apply in assessing whether to remand a case for resentencing in light of SB 1393. The People agree that authority pertaining to SB 620 is instructive.

Here, it is not clear whether or not the trial court would have stricken the nickel prior if it had the discretion to do so. The People claim the trial court “strongly

⁴ Both parties filed their opening briefs prior to January 1, 2019, the effective date of SB 1393. The People argued that defendant’s claim was not ripe. However, they agreed that if SB 1393 went into effect before his judgment became final, SB 1393 would apply retroactively.

indicated” it would not be in the furtherance of justice to reduce defendant’s punishment, when it declined to dismiss his prior strike conviction. They argue that the court’s denial of the *Romero* motion is a clear indication that the court would not have struck the nickel prior, given that the standard for dismissing a nickel prior is the same as the standard for dismissing a prior strike. They further point out that the prior strike was based on the same conduct as the nickel prior.

However, at the time of sentencing, the trial court had no discretion to dismiss the nickel prior and thus did not give this option any consideration. Furthermore, the court’s decision not to dismiss defendant’s prior strike does not clearly indicate that it would not “in any event” have stricken the nickel prior, if it had the discretion to do so.

(*McDaniels, supra*, 22 Cal.App.5th at p. 425.) There is no indication in the record that the court intended to impose the maximum possible sentence on defendant. To the contrary, the court commented that the probation department’s recommended sentence of 23 years was “a little heavy handed.” Moreover, the People requested the court to impose a total of sentence of 20 years, composed of the midterm of six years on count 1, doubled pursuant to the strike, plus the nickel prior and three years on the personal use enhancement. (§ 12022.5, subd. (a).) However, the court rejected that request and chose to strike the three years on the personal use enhancement, for a total sentence of 17 years.

In sum, we are not persuaded the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to lessen defendant’s sentence. Nothing in the trial court’s imposition of the sentence demonstrates what it would do with the newly afforded discretion under SB 1393. We conclude the trial court must be afforded the

opportunity to exercise this sentencing discretion. (See *McDaniels, supra*, 22 Cal.App.5th at p. 425; *Garcia, supra*, 28 Cal.App.5th at pp. 973-974.)

DISPOSITION

The matter is remanded to the trial court for the limited purpose of allowing it to exercise its discretion pursuant to sections 667, subdivision (a), and 1385, as amended by SB 1393. In all other respects, the judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

FIELDS
J.

RAPHAEL
J.